

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WASHINGTON, D.C. 20554

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MM Docket 94-149

Be-More and G&G are fully supportive of the FCC's efforts to reduce its significant staff resources necessary to review the current FCC Form 307 Extension Requests, and fully supports the new three year term for radio and television construction permits. However, the limited exceptions for tolling the three year period are unduly narrow, and may well result in the forfeiture of many

construction permits, despite the permittee's diligent efforts to timely construct. Forfeiture of construction permits for failure to construct for reasons beyond the control of the permittee are clearly not in the public interest and will only result in further delay of inauguration of new broadcast service.

The tolling period should apply to any period during which a permittee is awaiting a governmental authorization. It is not uncommon in a contested zoning matter for an initial determination to take years. Typically the administrative zoning processes involves in an initial determination by the Zoning Board, an appeal to the Zoning Board of Appeals, and then possibly even more levels of administrative appeal before a matter can be challenged in the courts. This process is exceedingly time consuming, especially where approval is sought for new towers. Often extensive studies are required to address RF compliance, environmental issues, esthetics, and alternative proposals. At the very least, tolling should be permitted on appeal, whether administrative or judicial, of an initial denial and in any instance where such initial decision has been delayed by more than one year. Without this adjustment in the tolling procedures, proponents of any new tower will only be encouraged to do whatever they can to stall and delay the zoning approval in order to prevail by attrition. Zoning authorities could likewise delay or impose undue restrictions, knowing that a permittee could lose it all unless it capitulates to zoning authority or governmental requests.¹

The Rules should also be modified to allow for tolling during the pendency of a major or minor modification application before the Commission. It is not uncommon, if not typical, for a

¹ As noted by the Commission in the *Report and Order*, six of seven comments urged the Commission to consider delays caused by obtaining zoning approval as a basis to toll the construction period. *Id* at ¶82. Several of the commenters provided specific examples of how delays in obtaining the zoning approval were clearly beyond their control. The Commission, however, in adopting its *Report and Order* chose to ignore these comments and real world experiences. The experiences of one commenter, Richard Harvey (represented by G&G), well illustrate how unfair it would be not to toll the construction period as proposed herein. Official notice requested of history of WBHX, Tuckerton, New Jersey construction permit.

permittee to seek a modification of its facilities after issuance of the construction permit. This may be necessary for any number of reasons, including unavailability of a site. If a permittee is denied necessary zoning or other authorizations after fighting an extended zoning battle, it may well decide that its best option is to locate another site, if available, and seek a modification of its construction permit. If the modification is challenged in any way, which is not uncommon², grant of the modification application can be significantly delayed. If the grant is then appealed, the ultimate determination on the modification application will likely take years and extend beyond the initial term of the construction permit. With the rule as is, competitors could be encouraged to oppose modification applications for the sole purpose of "running out" a construction permit. Therefore, the construction period should be tolled while modification applications are pending.

Although the framework adopted by the Commission for both the initial term and extension of construction permits is desirable, the tolling provisions should be broadened for the reasons discussed above.

Respectfully submitted,

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² See Petition to Deny minor modification application BMPH-980807IC, Manchester, Georgia; Petition for Reconsideration of minor modification application BMPH-920317IE, Saco, Maine; informal objection to minor modification application Tuckerton, New Jersey, BMPH-971030IB.